Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–458 OF 1998
GOPAL SRI RAM, MOHD SAARI AND MOHD GHAZALI JJCA
30 APRIL 2007

Contract — Construction of terms of contract — Credit facilities — Whether obligation of finance provider to ensure that duties on imported car under hire purchase agreement were paid

Contract — Frustration — Whether doctrine of frustration successfully raised — Self induced — Test to be applied — Whether frustration applied

Primakar Sdn Bhd ('Primakar') was an importer and dealer of motor cars. The first defendant which was a private limited company placed an order for a BMW motor car for importation into this country. The order form was signed on the first defendant's behalf by its managing director the second defendant. The first defendant then obtained finance from the plaintiff for the purchase of the car. The plaintiff purchased the car from Primakar and let it to the first defendant pursuant to a hire-purchase agreement entered into between them. The second defendant guaranteed repayment. Later, the car was seized by officers of the Royal Customs for default in the payment of the actual duty payable on the car. The first defendant then defaulted in paying the instalments due under the hire-purchase agreement. The plaintiff brought an action against the defendants to recover the sums due under the hire-purchase agreement. The defendants' defended the action on the principal grounds: (1) that the plaintiff had sold a car to which it had no title; (2) that the seizure of the car frustrated the contract so that the parties' rights should be adjusted in accordance with s 15(3) of the Civil Law Act 1956. In addition there was a counterclaim for the loss suffered by the seizure of the car. The learned judge found for the plaintiff on both points and dismissed the counterclaim. The defendant appealed.

Held, dismissing the appeal:

(1) There was no doubt — as found by the judge — that Primakar was acting as the first defendant's agent for the importation of the car. Indeed, cl 9 of the hire-purchase agreement makes it clear that the importer or dealer shall be the first defendant's agent. So, if there was any obligation to ensure that all duties payable on the car to customs were paid it squarely lay on Primakar. Since Primakar failed to pay the duties such failure would bind the first defendant: not the plaintiff. It followed that on a reading of the hire-purchase agreement as a whole, there was no promise by the plaintiff that it would

ensure that all duties due would be paid. In the absence of a clearly worded provision in a hire-purchase agreement imposing such an obligation, courts should not do so. For it does not accord with commercial reality that a finance provider in a hire-purchase transaction involving an imported car should be made to undertake such an onerous obligation. Hence cl 9, the clause warranting title had no application to the facts of this case as the plaintiff did have good title to the car. It was not for want of title that the car was seized. It was seized because duties had not been paid (see para 3).

(2) The doctrine of frustration as embodied in s 57 did not apply in this case. First, the event upon which the promissor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self induced frustration is ineffective. Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s 57 does not bite. In this case, two of the three elements were absent. First, this was a case in which the parties specifically provided for the event relied on by the first defendant as promisor. It was to be found in cl 3(b) of the hire-purchase agreement. Here there was a lawful forfeiture by the customs. The risk of that happening was allocated to the first defendant by the contract. So cl 3(b) applied and s 57 was excluded. Second, it was for the first defendant to have ensured that the duties were paid by its agent. It did not. It merely relied on its agent to make payment. That did not happen. So, if this was a case of frustration then it was self induced. For that reason, again s 57 did not apply (see paras 4, 7–8).

(3) As for the second defendant he promised that if the first defendant did not pay then he would. Since the primary obligation to pay still stands undischarged and the first defendant refused to pay, the second defendant was liable on his promise (see para 9).

[Bahasa Malaysia summary

Primakar Sdn Bhd ('Primakar') adalah pengimport dan pengedar kenderaan bermotor. Defendan pertama yang mana adalah syarikat sendirian berhad membuat pesanan untuk kereta BMW untuk pengimportan ke dalam negara ini. Borang pesanan telah ditandatangani oleh pengarah urusan bagi pihak defendan pertama yang juga adalah defendan kedua. Defendan pertama kemudiannya telah mendapatkan kewangan daripada plaintif untuk membeli kereta tersebut. Plaintif telah membeli kereta tersebut daripada Primakar dan menyewakannya kepada defendan pertama menurut perjanjian sewa beli yang dimasuki oleh mereka. Defendan kedua menjamin pembayaran semula. Kemudian, kereta tersebut telah disita oleh pegawai kastam atas kegagalam membayar duti sebenar yang perlu dibayar untuk kereta tersebut. Defendan pertama kemudiannya memungkiri pembayaran ansuran tertunggak di bawah perjanjian sewa beli. Plaintif telah memulakan tindakan

terhadap defendan-defendan untuk mendapatkan kembali jumlah tertunggak di bawah perjanjian sewa beli. Defendan-defendan mempertahankan tindakan atas alasan-alasan utama: (1) bahawa plaintif telah menjualkan kereta yang mana ia tiada hak milik; (2) penyitaan kereta telah menyebabkan kekecewaan kontrak oleh itu hak pihak-pihak seharusnya dilaraskan menurut s 15(3) Akta Undang-Undang Sivil 1956. Bahkan terdapatnya tuntutan balas untuk kerugian yang ditanggung daripada penyitaan kereta tersebut. Hakim yang bijaksana menyebelahi pihak plaintif untuk kedua-dua perkara tersebut dan menolak tuntutan balas. Defendan merayu.

Diputuskan, menolak rayuan:

(1) Adalah tidak dinafikan — seperti mana yang didapati oleh hakim — bahawa Primakar bertindak sebagai ejen defendan pertama bagi pengimportan kereta tersebut. Sememangnya klausa 9 perjanjian sewa beli adalah jelas bahawa pengimport atau pengedar adalah ejen defendan pertama. Oleh itu, jika terdapatnya apa-apa kewajipan untuk memastikan semua duti yang perlu dibayar atas kereta tersebut kepada kastam pembayarannya ia sebenarnya terletak ke atas Primakar. Apabila Primakar gagal untuk membayar duti, kegagalan tersebut akan mengikat defendan pertama: bukannya plaintif. Ianya diikuti dengan membaca perjanjian sewa beli secara keseluruhan, tiada perjanjian oleh plaintif bahawa ianya perlu memastikan kesemua duti tertunggak perlu dibayar. Dalam ketiadaan peruntukan yang jelas dalam perjanjian sewa beli mengenakan kewajipan tersebut, mahkamah seharusnya tidak melakukannya. Untuknya tidak selaras dengan keadaan sebenar komersial bahawa penyedia kewangan dalam transaksi sewa beli yang terlibat dalam pengimportan kereta perlu membuat akujanji atas kewajipan yang membebankan. Oleh ito klausa 9, klausa alasan hak milik tidak terpakai kepada fakta dalam kes ini yang mana plaintif sememangnya mempunyai hak milik yang baik kepada kereta tersebut. Ia bukannya disebabkan hak milik yang menyebabkan kereta disita. Ianya disita kerana duti tidak dibayar (lihat perenggan 3).

(2) Doktrin kekecewaan seperti mana termaktub di dalam s 57 tidak terpakai dalam kes ini. Pertama, keadaan di mana penjanji bergantung yang mempunyai kontrak terkecewa mestilah satunya yang tiada peruntukan dibuat di dalam kontrak. Jika peruntukan telah dibuat kemudian pihak-pihak mestilah memperuntukkan risiko di antara mereka. Kedua, keadaan di mana penjanji bergatung mestilah satu yang beliau tidak bertanggungan. Secara ringkas, kekecewaan yang tercetus sendiri adalah tidak efektif. Ketiga, keadaan yang dikatakan untuk melepaskan janji mestilah memberikannya perbezaan yang radikal daripada yang dijanjikan oleh kontrak. Mahkamah mestilah mendapatinya tidak adil secara praktikal untuk menguatkuasakan janji yang asal. Jika mana-mana daripada elemen-elemen ini tidak wujud pada fakta kes yang diberikan, maka s 57 tidak memberikan kesan. Dalam kes ini, dua daripada tiga elemen tidak wujud. Pertama, ia adalah kes yang mana pihak-pihak secara spesifiknya menyediakan keadaan kebergantungan oleh defendan pertama sebagai penjanji. Ianya didapati dalam klausa 3(b) perjanjian sewa beli. Di sini terdapatnya penyitaan yang sah oleh kastam. Risiko kejadian tersebut adalah diperuntukkan kepada defendan

pertama oleh kontrak. Oleh itu klausa 3(b) terpakai dan s 57 adalah tidak termasuk. Kedua, adalah defendan pertama yang perlu memastikan bahawa duti dibayar oleh ejennya. Ianya tidak. Ia hanya bergantung kepada ejennya untuk membuat bayaran. Itu tidak berlaku. Oleh itu, jika ini adalah kes kekecewaan kontrak maka ianya adalah tercetus sendiri. Atas sebab tersebut, sekali lagi s 57 tidak terpakai (lihat perenggan 4, 7–8).

(3) Berkenaan dengan defendan kedua, beliau menjanjikan bahawa jika defendan pertama tidak bayar maka beliau akan membayarnya. Sejak kewajipan utama untuk membayar masih tidak dilepaskan dan defendan pertama enggan membayar, defendan kedua adalah bertanggungan ke atas janjinya (lihat perenggan 9).]

Notes

For a case on credit facilities, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2748.

For cases on frustration generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3293–3331.

Cases referred to

Central Bank of India Staff Co-operative Building Society Ltd v Dulipalla Rao AIR 2004 AP 18 (folld)

Ocean Tramp Tankers Corp v V/O Sovfracht [1964] 1 All ER 161 (folld)

Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors [2000] 3 MLJ 699 (refd)

Legislation referred to

Civil Law Act 1956 s 15(3)
Contracts Act 1950 s 57
Contract Act 1872 [India] s 56
Courts of Judicature Act 1964 s 42

Appeal from: Civil Suit No D2–23–1478 of 1988 (High Court, Kuala Lumpur)

LC Loh (LC Loh & Co) for the appellant.
Cheah Tien Eu (Suhaimi Khor Zulkifli & Chang) for the respondents.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This appeal is directed against the order of the High Court entering judgment for the plaintiff (respondent before us) against the defendants (appellants before us) and in dismissing the first defendant's counterclaim. The factual background against which this appeal rests is as follows.

[2] Primakar Sdn Bhd ('Primakar') is an importer and dealer of motor cars. The first defendant which is a private limited company placed an order for a BMW motor car for importation into this country. The order form was signed on the first

defendant's behalf by its managing director the second defendant. The first defendant then obtained finance from the plaintiff for the purchase of the car. The plaintiff purchased the car from Primakar and let it to the first defendant pursuant to a hire-purchase agreement entered into between them. The second defendant guaranteed repayment. Later, the car was seized by officers of the Royal Customs for default in the payment of the actual duty payable on the car. The first defendant then defaulted in paying the instalments due under the hire-purchase agreement. The plaintiff brought an action against the defendants to recover the sums due under the hire-purchase agreement. The defendants' defended the action on the principal grounds (i) that the plaintiff had sold a car to which it had no title; (ii) that the seizure of the car frustrated the contract so that the parties' rights should be adjusted in accordance with s 15(3) of the Civil Law Act 1956. In addition there was a counterclaim for the loss suffered by the seizure of the car. The learned judge found for the plaintiff on both points and, as I have already said, dismissed the counterclaim.

[3] The submissions made in the court below were repeated before us. After careful consideration I am satisfied that the learned judge was right and that this appeal must fail. My reasons are as follows. In the first place, there is no doubt — as found by the judge — that Primakar was acting as the first defendant's agent for the importation of the car. Indeed, cl 9 of the hirepurchase agreement makes it clear that the importer or dealer shall be the first defendant's agent. So, if there was any obligation to ensure that all duties payable on the car to Customs were paid squarely lay on Primakar. Since Primakar failed to pay the duties such failure would bind the first defendant: not the plaintiff. It follows that on a reading of the hire-purchase agreement as a whole, there was no promise by the plaintiff that it would ensure that all duties due would be paid. In the absence of a clearly worded provision in a hire-purchase agreement imposing such an obligation, courts should not do so. For it does not accord with commercial reality that a finance provider in a hire-purchase transaction involving an imported car should be made to undertake such an onerous obligation. Hence cl 9, the clause warranting title has no application to the facts of this case as the plaintiff did have good title to the car. It was not for want of title that the car was seized. It was seized because duties had not been paid.

[4] With that I now turn to the second point in the case, namely the issue of frustration. Although this caused me some initial anxiety I have, after considering the relevant law, come to the conclusion that the doctrine has no application to the facts of this case. The starting point is s 57 of the Contracts Act 1950 which provides:

> (1) An agreement to do an act impossible in itself is void.
>
> (2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> (3) Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, the promisor must make compensation to the promisee for any loss which the promisee sustains through the nonperformance of the promise.

[5] This section is *ipsissima verbis* s 56 of the Indian Contract Act 1872. The latter was explained in the following terms in *Central Bank of India Staff Co-operative Building Society Ltd v Dulipalla Rao* AIR 2004 AP 18 by Yethirajulu J (Bilal Nazki J concurring):

> The first paragraph of s 56 provides that an agreement to do an act impossible in itself is void. The second paragraph provides that a contract to do an act, which becomes unenforceable, if the act becomes: (a) impossible; or (b) by reason of some event which the promisor could not prevent. This section also provides that it becomes so unenforceable when the act becomes impossible or unlawful. The first paragraph represents the law as in England. The second paragraph has the effect of turning into a general rule, the limited exceptions under English law. The Act lays down positive rules of law on questions which English and American Courts have of late more and more tended to regard as matters of construction, depending on the true intention of the parties. Frustration signifies a certain set of circumstances arising after the formation of the contract, the occurrence of which is due to no fault of either party and which renders performance of the contract by one or both parties physically and commercially impossible. The Court regards these sets of circumstances as releasing the parties from any further obligations. Where the entire performance of a contract becomes substantially impossible without any fault on either side, the contract is prima facie dissolved by the doctrine of frustration. The law excuses further performance under the doctrine of frustration, where the contract is silent as to the position of the parties in the event of performance becoming literally impossible or only possible in a very different way from that originally contemplated. The doctrine of frustration operates to excuse from further performance where (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that a particular person will continue to be available, or that some future event, which forms the basis of the contract, will take place; and (2) before breach, an event in relation to the matter stipulated in (1) renders performance impossible or only possible in a very different way from that contemplated, but without default of either party.

[6] In *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & Ors* [2000] 3 MLJ 699, this court applied the following dictum of Lord Denning MR in *Ocean Tramp Tankers Corp v V/O Sovfracht* [1964] 1 All ER 161 (CA):

> It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. But it is not so. It is not so much that it is 'unexpected', but rather that the parties have made no provision for it in their contract. The point about it, however, is that: If the parties did not foresee anything of the kind happening, you can readily infer that they have made no provision for it. Whereas, if they did foresee it, you would expect them to make provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the Republican Government. The purpose was to evacuate refugees. The parties foresaw that she might be seized by the Nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated: see *WJ Tatem Ltd v Gamboa* [1938] 3 All ER 135. So, here, the parties foresaw that the canal might become impassable. It was the very thing that they feared. But they made no provision for it. So the doctrine may still apply, if it be a proper case for it.
>
> We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract': see *Davis Contractors Ltd v Fareham UDC* [1956] 2 All ER 145 at p 160; [1956] AC 696

at p 729, per Lord Radcliffe. To see if the doctrineapplies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the old situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done, and it is for the courts to do it as a matter of law: see *Tsakiroglou & Co Ltd v Noblee & Thorl GmbH* [1961] 2 All ER 179 at pp 185, 187, [1962] AC 93 at pp 116, 119, per Viscount Simonds and per Lord Reid.

[7] It follows from the foregoing authorities that there are three elements woven into the fabric of the doctrine embodied in s 57. First, the event upon which the promisor relies as having frustrated the contract must have been one for which no provision has been made in the contract. If provision has been made then the parties must be taken to have allocated the risk between them. Second, the event relied upon by the promisor must be one for which he or she is not responsible. Put shortly, self induced frustration is ineffective. Third, the event which is said to discharge the promise must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise. If any of these elements are not present on the facts of a given case, then s 57 does not bite.

[8] Now test the facts of the present instance for these three elements and you will find two of them absent. First, this is a case in which the parties specifically provided for the event relied on by the first defendant as promisor. It is to be found in cl 3(b) of the hire purchase agreement which states that 'the hirer (that is to say the first defendant) shall indemnify the owner (the plaintiff) against the destruction or loss of goods (including lawful forfeiture)'. Here there was a lawful forfeiture by the Customs. The risk of that happening was allocated to the first defendant by the contract. So cl 3(b) applies and s 57 is excluded. Second, as I have already said, it was for the first defendant to have ensured that the duties were paid by its agent. It did not. It merely relied on its agent to make payment. That did not happen. So, if this is a case of frustration then it was self induced. For that reason, again s 57 does not apply.

[9] As for the second defendant he promised that if the first defendant did not pay then he would. Since the primary obligation to pay still stands undischarged and the first defendant refused to pay, the second defendant is liable on his promise.

[10] It follows from the preceding discussion that the defendants being in breach of their respective promises, their counterclaim could not possibly succeed. The judge was accordingly right in dismissing it.

[11] For the reasons already given this appeal is dismissed. The respondents must pay the appellant the costs of this appeal. The deposit in court shall be paid to the respondent to account of its taxed costs. All the orders of the High Court are affirmed.

[12] This is a case in which our learned brother Mohd Saari JCA retired after we reserved judgment. Accordingly, this judgment is delivered pursuant to s 42 of the Courts of Judicature Act 1964.

[13] My learned brother Mohd Ghazali JCA has seen this judgment in draft and has expressed his agreement with it.

Appeal dismissed.

Reported by Loo Lai Mee